STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 9464
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

FINDINGS OF FACT

1. The petitioner is a 55-year-old man with a high school diploma and a year and a half of formal training in electronics. He has a long and consistent work history and most recently was successfully self-employed as a building contractor for ten years. The petitioner abandoned his business in February of 1989 after suffering seizures and a stroke.

2. Medical tests indicate that the petitioner likely suffered damage to the left side of his brain as a result of the stroke. He also continues to suffer seizures and headaches on a regular basis several times per week and often more than once in the same day. His seizures have not been controlled by anticonvulsants. Because of the seizures, the petitioner cannot work with dangerous machinery, drive a car, or work from heights. He is, therefore, unable to return to

his work as a building contractor which job required him to use power tools, drive to construction sites, and work at heights.

3. The petitioner also has cognitive problems as a result of the stroke and is being followed for these problems by both a neurologist and a psychiatrist who is also a neuropsychologist both of whom are physicians at a teaching hospital. They have called the petitioner's case "complex" and "unclear" but have identified several areas of marked impairment including short term memory and ability to concentrate as well as impairments in math skills, spatial orientation and verbal and intellectual ability. In addition, the petitioner was diagnosed by the psychiatrist as suffering from mild depression and irritability secondary to his current condition which tends to exacerbate all his symptoms. He has noted loss of interest in activities, loss of appetite, sleep disturbances, decreased energy, feelings of guilt or worthlessness and difficulty concentrating. It is his treating psychiatrist's opinion that the petitioner has marked restrictions of daily living due largely to his depression and in part due to his cognitive defects and that his social life is significantly, but not markedly, impaired by his problems. He definitely feels the petitioner experiences deficiencies of concentration, persistence and pace due mainly to brain damage but partly to his depression which results in failure to complete tasks in a timely

manner. He also feels these deficits have caused the petitioner to experience repeated episodes of deterioration or decompensation in work or work-related settings which cause him to withdraw from the situation or experience exacerbation of signs and symptoms.

4. The petitioner was administered an intelligence test by a psychologist at the request of DDS, who examined the petitioner on a "good day", when the petitioner was not experiencing seizures or headaches. The I.Q. test results suggest that the petitioner may have lost up to 24 I.Q. points (from 115 to 91) in his intellectual abilities compared with pre-stroke levels. Although the petitioner was able to carry out the tests without serious difficulty, the psychologist found he had some trouble with regard to his verbal abilities (difficulty finding words), brief concentration lapses, and that his overall memory seemed somewhat inconsistent though not severely impaired. The psychologist also noted that the petitioner became fatigued in the last part of the test and felt he was suffering significant levels of depression on an intermittent basis. He specifically noted that the petitioner felt very guilty about his inability to work and being supported by his wife and was frequently teary-eyed. He concluded that there is "evidence of a significant loss of cognitive ability. However, despite these losses, there also appear to be many areas of relatively spared functioning which may make it more difficult to develop a clear picture of [petitioner's]

cognitive strengths and weaknesses. Also it is not clear to what extent his level of depression may also be affecting his current functioning."

5. It is possible that over the next year the petitioner may recover some of his cognitive abilities but he is not expected to make a full recovery and has not improved much in the last six months.

6. Based upon the testimony of the petitioner and his wife, both of whom were sincere and credible witnesses, it is found that the petitioner has frequent difficulty remembering dates and places; does not go unaccompanied on shopping trips due to disorientation and confusion, does not drive due to his seizures; tires easily due to his seizures and his anti-depressant medications and takes frequent naps throughout the day; has trouble sleeping at night; does light housework and cooking while his wife is at work; has abandoned his former social activities at the VFW and Knights of Columbus because they are too exhausting; frequently gets sad and bursts into tears or gets explosively angry where he was formerly calm and easy going; and experiences frustration when trying to perform tasks he formerly did easily such as dealing with figures and finances or finding a road or a house.

7. The evidence with regard to the petitioner's mental dysfunctioning in paragraphs 3 and 6 above is not totally consistent with regard to the severity of his cognitive deficits. However, as the psychologist has

admitted that he may have tested the petitioner on a "good day" and as the petitioner's situation appears to be complex, greater weight will be accorded to the expert opinion of the treating psychiatrist-neurologist because of his greater training and expertise, treatment relationship with the petitioner and because his assessment is more consistent with the petitioner's own credible testimony. It is therefore further found that:

A. The petitioner has suffered some left hemisphere brain damage possibly as the result of a stroke experienced in February of 1989, which has resulted in the significant loss of some cognitive abilities.

B. The petitioner has experienced persistent short term memory impairment, thinking disturbances (confusion), a personality change (irritability), emotional lability (explosiveness and sudden crying), and depression.

C. The petitioner's various symptoms, including his depression and fatigue; have markedly affected his ability to carry on the activities of normal daily living (i.e., shopping and driving); have significantly affected his social functioning (i.e., loss of interest in hobbies and prior organizations); have affected his concentration, persistence or pace in such a way that he frequently fails to complete tasks in a timely manner and have resulted in the petitioner's frustration in trying to accomplish tasks and work tasks he formerly did easily leading to his inability to return to work.

ORDER

The decision of the department is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

> Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to

> result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

The petitioner has met his burden of proving that he cannot return to his former work. The department has attempted to meet its burden of showing that the petitioner has the residual functional capacity to do other work by claiming that the petitioner's cognitive deficits are not so severe that they significantly affect his remaining work abilities. However, the evidence supplied by the petitioner at hearing and subsequent to the hearing from his treating physicians show that assessment to be inaccurate. The medical evidence shows that the petitioner meets the level of severity for "Organic Mental Disorders" found in the Listings of Impairments at 20 C.F.R. э 404, Subpart P, Appendix I, by virtue of paragraphs 2 through 6 of Part A and paragraphs 1, 3 and 4 of Part B:

> 12.02 Organic Mental Disorders:
>
> > Psychological or behavioral abnormalities associated with a dysfunction of the brain. History and physical examination or laboratory tests demonstrate the presence of a specific organic factor judged to be etiologically related to the abnormal mental state and loss of previously acquired functional abilities.
> >
> > The required level of severity for those disorders is met when the requirements in both A and B are satisfied.

A. Demonstration of a loss of specific cognitive abilities or affective changes and the medically documented persistence of at least one of the following:

1. Disorientation to time and place; or

2. Memory impairment, either short-term (inability to learn new information), intermediate, or long-term (inability to remember information that was known some time in the past); or

3. Perceptual or thinking disturbances (e.g., hallucinations, delusions); or

4. Change in personality; or

5. Disturbance in mood; or

6. Emotional lability (e.g., explosive temper outbursts, sudden crying, etc.) and impairment in impulse control; or

7. Loss of measured intellectual ability of at least 15 I.Q. points from premorbid levels or overall impairment index clearly within the severely impaired range on neuropsychological testing, e.g., the Luria-Nebraska, Halstead-Reitan, etc;

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

As the petitioner has met the listings, he must be determined to be disabled. 20 C.F.R. ə 416.925.

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